RAYMOND WAHAB v. PP & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEALS NO: J-05(M)-104-03-2016 (IDN)
& J-05(M)-106-03-2016 (IDN)]
31 MAY 2017

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in 98.3g of ketamine – Conviction and sentence – Appeal against – Whether premises where drugs were seized accessible to persons other than accused – Whether accused's DNA found on items seized from premises – Whether accused had care and management of premises – Whether essential elements required to prove possession established – Whether safe to invoke presumption of s. 37(b) of Dangerous Drugs Act 1952 – Whether there was failure to appreciate accused's defence – Failure of trial judge to deliver grounds of judgment – Whether prejudiced and disadvantaged accused – Whether conviction safe – Whether accused ought to be acquitted and discharged – Courts of Judicature Act 1964, s. 52(1) – Criminal Procedure Code, s. 308*

CRIMINAL LAW: *Poisons Act 1952 – Section 30(3) – Possession of 1.08g of nitrazepam – Conviction and sentence – Appeal against – Whether premises where poison chemicals were seized accessible to other persons than accused – Whether accused's DNA found on items seized from premises – Whether accused had care and management of premises – Whether essential elements required to prove possession established – Whether custody and control of psychotropic substances proved – Whether there was failure to appreciate accused's defence – Failure of trial judge to deliver grounds of judgment – Whether prejudiced and disadvantaged accused – Whether conviction safe – Whether accused ought to be acquitted and discharged – Courts of Judicature Act 1964, s. 52(1) – Criminal Procedure Code, s. 308*

EVIDENCE: *Witness – Failure of prosecution to call witnesses – Prosecution chose not to produce important witness's statement – Whether omission on prosecution's part justified invocation of s. 114(g) of Evidence Act 1950 – Failure to ensure witness statement under s. 112 statement properly admitted – Whether there was non-compliance of s. 32 of Evidence Act 1950*

The appellant was jointly charged with Koh Mei Ling ('PW5') with an offence of trafficking in dangerous drugs involving 983.29g of ketamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'), and an offence of possession of 1.08g of nitrazepam under s. 30(3) of the Poisons Act 1952 ('Poisons Act'). On the first charge, the appellant was sentenced to death whereas on the second charge, the appellant was sentenced to four years

A imprisonment. The appellant thus appealed against both convictions and sentences. It was the prosecution's narrative that the appellant was arrested at a house ('house number 22'). According to PW4, he was instructed to locate the residential address of PW5, the appellant's wife. PW5 was located and brought to the Straits View Condominium ('the said premises'). PW4 B had then taken the appellant to the said premises and used one of the keys from the bunch of keys that was seized from the console area of a black Honda City owned by PW5 and gained access to the said premises. A search was conducted and from the first room in the said premises, a Pierre Cardin bag was found containing clear plastic packets with various purple coloured C pills, pink coloured pills and 'ang pau' packets containing various other pills. From a display cabinet in a second room, a paper bag was found containing packets with pills in them. These incriminating exhibits were seized and the pills were sent for chemical analysis which confirmed that the pills were ketamine and nitrazepam. In this appeal, the decision of the Judicial Commissioner ('JC') was questioned on three principal grounds, namely, D (i) whether the trial judge had erred in fact and in law when His Lordship called for the appellant to enter his defence, when His Lordship instead ought to have found that the appellant was not in possession of the drugs; (ii) that His Lordship failed to appreciate the defence of the appellant; and (iii) the failure of the trial judge to deliver his grounds of judgment had seriously E prejudiced and disadvantaged the appellant.

Held (allowing appeal; setting aside conviction and sentence)
Per Idris Harun JCA delivering the judgment of the court:

(1) The registered owner of the premises where the drugs were seized by the F police was Orientvel Sdn Bhd ('Orientvel'). On the date of the appellant's arrest, the appellant was no longer the director of Orientvel. The directors were Tee Ju Ian and Tee Kim Teck, who had access to the premises in question. Having access to the said premises was an important evidence that would show that other persons such as Tee Kim G Teck who were alleged to have access thereto might probably have access to the drugs as well. The investigation officer ('PW9') had confirmed in cross-examination that he had recovered a statement from Tee Kim Teck. The prosecution chose fit not to introduce the statement. No reasons were given nor explanation afforded by the prosecution why the statement was not produced even though the appellant had put to the H prosecution witness, namely PW9, that Tee Kim Teck had access to the said premises and that the impugned drugs were placed thereat by Tee Kim Teck and Tee Ju Lan. Such failure or omission on the part of the prosecution would justify the invocation of s. 114(g) of the Evidence Act 1950 ('Evidence Act') that the evidence through Tee Kim Teck which I could be but was not produced would if produced be unfavourable to the prosecution who withheld it. (paras 10 & 12)

(2) PW9 in his testimony confirmed that he seized, *inter alia*, three toothbrushes from the bathroom of the first bedroom, a shaver and two toothbrushes from the said first bedroom. PW9 further confirmed that the DNA of the appellant was not found on any of the items seized. It was also not in dispute that the keys to the said premises were not found on the person of the appellant. Although PW5 testified that the keys belonged to the appellant, her evidence ought to be considered very carefully as PW5 had every motivation to put blame on the appellant as she was indeed an accused turned prosecution witness. Further, apart from PW5, there were two other persons namely Tee Ju Lan and Tee Kim Teck who lived at or had access to the premises. The appellant did not have the care and management of the premises. There were evidential gaps found in the prosecution's case that it would be wholly unsafe for this court to invoke the presumption of s. 37(b) of the DDA. (paras 18 & 19)

(3) This court could not say with certainty that the appellant had the power to deal with the impugned drugs to the exclusion of all others in respect of both charges. The essential elements required to prove possession had not been established. Consequently, the element of possession essential in proving the offence of trafficking under s. 39B(1)(a) of the DDA and s. 30 of the Poisons Act had not been proven by the prosecution. The JC should not have called upon the appellant to enter on his defence on both charges. (para 22)

(4) The JC failed to appreciate that the defence of the appellant on others having access had been put to the relevant prosecution witnesses, namely PW4, PW5 and PW9. It was also put to PW9 that Tee Ju Lan and her children had been to the said premises. The appellant also called Tee Ju Lan's son, DW2, who in essence testified that on 25 March 2013, he and his friends were in the said premises. DW2 was brought there by Tee Ju Lan. By reason of the stance taken by the defence, it was of utmost importance that the prosecution called Tee Ju Lan or at the very least ought to have ensured that her s. 112 statement was properly admitted in compliance with the strict conditions of s. 32 of the Evidence Act. The JC had failed to appreciate or appraise adequately the defence of the appellant. (para 23)

(5) It was indeed a matter of great regret that in this case where the appellant was facing a death sentence, the JC had not provided grounds, let alone detailed reasons, of his decision in utter breach of s. 52(1) of the Courts of Judicature Act 1964. Section 308 of the Criminal Procedure Code provides a mandatory requirement for the transmission of the grounds of the decision to the appellate court and the parties. If no grounds of decision were provided it would not be far fetched to say that the conviction could not be defended as it would be in breach of art. 5(1) of the Federal Constitution. (paras 24 & 27)

(6) The present appeal involved a capital charge, therefore the nature of the case would render reasoned decision even more necessary. The appellant did not know on what basis the trial judge had found that he was trafficking in the absence of direct evidence of the same; all the more reason why the appellant should be provided with detailed reasons for his conviction and sentence. Similarly, as regards the second charge, the appellant would not be in a position to know the basis upon which he was found to have in his custody or under his control the psychotropic substance and thus was deemed to have been in possession of the substance and to have known the nature of the substance. Under s. 30(4) of the Poisons Act, once the presumption arises, the appellant has to rebut the said presumption by showing proof to the contrary. Yet, no reasons were given that could provide justification to the appellant as to why he was found to have failed to prove to the contrary and to assist this court to determine whether His Lordship was correct in his findings. Thus, the appellant's convictions on both charges were unsafe. The appellant was acquitted and discharged. (paras 29 & 30)

Bahasa Malaysia *Headnotes*

Perayu dipertuduh bersama Koh Mei Ling ('PW5') dengan kesalahan mengedar dadah berbahaya seberat 983.29g ketamine bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan kesalahan memiliki 1.08g nitrazepam bawah s. 30(3) Akta Racun 1952 ('Akta Racun'). Perayu dihukum mati atas pertuduhan pertama dan dihukum penjara empat tahun atas pertuduhan kedua. Perayu dengan itu merayu terhadap kedua-dua sabitan dan hukuman. Naratif pihak pendakwaan menyatakan bahawa perayu ditahan di sebuah rumah ('rumah nombor 22'). Menurut PW4, beliau diarahkan untuk mencari alamat kediaman PW5, isteri perayu. PW5 dapat ditemui dan dibawa ke Straits View Condominium ('premis tersebut'). PW4 kemudiannya membawa perayu ke premis tersebut dan menggunakan salah satu kunci dari sekumpulan kunci yang dirampas dari kawasan konsol kereta Honda City berwarna hitam dimiliki PW5 dan mendapat akses ke premis tersebut. Carian dijalankan dan dari bilik pertama premis tersebut, satu beg Pierre Cardin dijumpai mengandungi paket plastik mempunyai beberapa pil berwarna ungu, pil berwarna merah samar dan paket-paket 'ang pau' yang mengandungi beberapa pil lain. Dari kabinet paparan di bilik kedua, satu beg kertas dijumpai mengandungi paket-paket yang didalamnya terdapat beberapa pil. Ekshibit-ekshibit ini dirampas dan pil-pil dihantar ke penganalisis kimia yang mengesahkan pil-pil adalah ketamine dan nitrazepam. Dalam rayuan ini, keputusan Pesuruhjaya Kehakiman ('PK') dipertikaikan atas tiga alasan utama, iaitu, (i) sama ada hakim bicara terkhilaf dari segi fakta dan undang-undang apabila beliau memanggil perayu untuk memasukkan pembelaan, padahal beliau sepatutnya mendapati bahawa perayu tidak mempunyai milikan ke atas dadah-dadah tersebut; (ii) sama ada

hakim bicara gagal mempertimbangkan pembelaan perayu; dan (iii) sama ada kegagalan hakim bicara untuk menyampaikan alasan penghakiman memprejudiskan dan merugikan perayu.

Diputuskan (membenarkan rayuan; mengetepikan sabitan dan hukuman) Oleh Idris Harun HMR menyampaikan penghakiman mahkamah:

(1) Pemilik berdaftar premis tersebut di mana dadah dirampas oleh pihak polis adalah Orientvel Sdn Bhd ('Orientvel'). Pada tarikh perayu ditangkap, perayu bukan lagi pengarah Orientvel. Pengarah-pengarah Orientvel adalah Tee Ju Lan dan Tee Kim Teck, yang mempunyai akses ke premis tersebut. Ini adalah keterangan penting kerana ia menunjukkan bahawa orang lain seperti Tee Kim Teck yang didakwa mempunyai akses ke premis kemungkinan mempunyai akses ke atas dadah-dadah juga. Pegawai penyiasat ('PW9') mengesahkan semasa pemeriksaan balas bahawa dia telah mendapatkan kenyataan daripada Tee Kim Teck. Pihak pendakwaan memutuskan untuk tidak mengemukakan kenyataan tersebut. Tiada alasan atau penjelasan diberikan oleh pihak pendakwaan mengapa kenyataan tersebut tidak dikemukakan walaupun perayu telah memberitahu saksi pihak pendakwaan PW9 bahawa Tee Kim Teck mempunyai akses ke atas premis tersebut dan bahawa dadah-dadah itu ditempatkan di situ oleh Tee Kim Teck. Kegagalan atau peninggalan sebegitu dari pihak pendakwaan menjustifikasikan penggunaan s. 114(g) Akta Keterangan 1950 ('Akta Keterangan') bahawa keterangan melalui Tee Kim Teck yang tidak dikemukakan itu berkemungkinan tidak memihak kepada pihak pendakwaan yang telah menahannya.

(2) PW9 dalam testimoninya mengesahkan bahawa dia telah merampas, antara lain, tiga penggosok gigi dari bilik air bilik tidur pertama dan satu pencukur serta dua lagi penggosok gigi dari bilik tidur pertama. PW9 mengesahkan bahawa DNA perayu tidak ditemui pada semua item-item yang dirampas. Tidak dipertikaikan bahawa kunci ke premis tersebut tidak ditemui pada perayu. Walaupun PW5 memberi testimoni bahawa kunci tersebut milik perayu, tetapi keterangannya harus dipertimbangkan dengan berjaga-jaga kerana PW5 mempunyai motivasi untuk menyalahkan perayu kerana dia juga tertuduh yang dijadikan saksi pihak pendakwaan. Selanjutnya, selain daripada PW5, terdapat dua lagi orang iaitu Tee Ju Lan dan Tee Kim Teck yang tinggal di premis tersebut dan mempunyai akses ke premis tersebut. Perayu tidak mempunyai penjagaan dan pengurusan premis tersebut. Terdapat kelompongan dalam kes pendakwaan dan adalah tidak selamat untuk mahkamah ini menggunakan anggapan s. 37(b) ADB.

(3) Mahkamah ini tidak boleh menyatakan dengan pasti bahawa hanya perayu sahaja mempunyai kuasa untuk berurusan dadah-dadah yang dipertikaikan berkenaan kedua-dua pertuduhan. Elemen penting yang diperlukan untuk membuktikan pemilikan tidak dibuktikan. Akibatnya, elemen pemilikan yang penting untuk membuktikan kesalahan pengedaran di bawah s. 39B(1)(a) ADB dan s. 30 Akta Racun gagal dibuktikan oleh pihak pendakwaan. Pesuruhjaya Kehakiman tidak sepatutnya memanggil perayu memasukkan pembelaannya ke atas kedua-dua pertuduhan.

(4) Pesuruhjaya Kehakiman gagal mempertimbangkan bahawa pembelaan perayu berkenaan individu-individu lain juga mempunyai akses telah dinyatakan pada saksi-saksi pendakwaan, iaitu, PW4, PW5 dan PW9. Adalah juga dinyatakan pada PW9 bahawa Tee Ju Lan dan anak-anaknya telah ke premis tersebut. Perayu juga memanggil anak lelaki Tee Ju Lan, DW2, yang memberi keterangan bahawa dia berada di premis tersebut bersama rakan-rakannya pada 25 Mac 2013. DW2 telah dibawa ke sana oleh Tee Ju Lan. Oleh sebab sikap yang diambil oleh pembelaan, adalah penting untuk pihak pendakwaan memanggil Tee Ju Lan atau paling kurang pun memastikan bahawa pernyataan s. 112 Tee Ju Lan diakui dengan betul dan mematuhi syarat-syarat tegas s. 32 Akta Keterangan.

(5) Adalah menjadi satu kekesalan besar bahawa dalam kes ini di mana perayu berhadapan dengan hukuman mati, PK tidak memberikan alasan terperinci berkenaan keputusannya dan ini adalah pelanggaran s. 52(1) Akta Mahkamah Kehakiman 1964. Seksyen 308 Kanun Tatacara Jenayah menyediakan keperluan mandatori untuk penghantaran alasan keputusan kepada mahkamah rayuan dan pihak-pihak terlibat. Jika tiada alasan penghakiman diberikan, sabitan tidak boleh dipertahankan kerana ia melanggar per. 5(1) Perlembagaan Persekutuan.

(6) Rayuan ini melibatkan pertuduhan hukum bunuh, oleh itu sifat kes akan membuatkan alasan penghakiman yang munasabah lebih penting lagi. Perayu tidak tahu atas dasar apa hakim bicara mendapati bahawa dia telah mengedar dadah atas ketiadaan keterangan langsung yang sama; dengan itu perayu perlu dibekalkan dengan alasan-alasan terperinci untuk sabitan dan hukumannya. Sama juga, berkenaan dengan pertuduhan kedua, perayu tidak berada dalam kedudukan untuk mengetahui atas dasar apa dia didapati mempunyai kawalan ke atas bahan psikotropik dan dengan itu dikatakan mempunyai milikan ke atas bahan itu dan mengetahui sifat bahan itu. Di bawah s. 30(4) Akta Racun, apabila timbul anggapan, perayu harus menyangkal anggapan tersebut dengan menunjukkan bukti yang bertentangan. Tetapi, tiada alasan diberikan yang boleh membekalkan justifikasi kepada perayu mengapa dia gagal membuktikan sebaliknya dan gagal menolong mahkamah

menentukan sama ada hakim bicara betul dalam dapatannya. Oleh itu, sabitan perayu ke atas kedua-dua pertuduhan adalah tidak selamat. Perayu dilepaskan dan dibebaskan.

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Johnbosco Chinedu Augustine v. PP [2016] 3 CLJ 732 CA ***(refd)***
Ooi Chee Seong & Anor v. PP [2014] 7 CLJ 505 CA ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
Rengarajan Thangavelu v. PP [2015] 1 CLJ 993 CA ***(refd)***
Ruslan Xanqulu Oglu v. PP [2016] 1 LNS 132 CA ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC ***(refd)***
Thivasalim Abdul Majeed v. PP [2014] 2 CLJ 963 CA ***(refd)***
Thong Ah Fat v. PP [2012] 1 SLR 676 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 52(1)
Criminal Procedure Code, ss. 112, 308
Dangerous Drugs Act 1952, ss. 2, 37(b), (da), 39B(1)(a), First Schedule
Evidence Act 1950, ss. 32(1), 114(g)
Federal Constitution, art. 5(1)
Poisons Act 1952, s. 30(3), (4)

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Dhiya Syazwni Izyan Mohd Akhir; DPP

[Editor's note: Appeal from High Court, Johor Bahru; Criminal Trial No: 45A-44/11-2013 & 45A-46/12-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

[1] The appellant in this appeal was jointly charged with Koh Mei Ling with an offence of trafficking in dangerous drug involving 983.29g of ketamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) and an offence of possession of 1.08g of nitrazepam under s. 30(3) of the Poisons Act 1952 (Act 366). The charges are couched in the following terms:

First Charge

Bahawa kamu bersama-sama pada 27.3.2013 jam lebih kurang 1.50 pagi, di rumah beralamat No. 08-E3, Blok B, The Straits View Condominium, Jalan Permas Selatan, Bandar Baru Permas Jaya, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah mengedar dadah berbahaya iaitu 983.29 gram Ketamin dan yang demikian kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

Second Charge

Bahawa kamu bersama-sama pada 27.3.2013 jam lebih kurang 1.50 pagi, di rumah beralamat No. 08-E3, Blok B, The Straits View Condominium, Jalan Permas Selatan, Bandar Baru Permas Jaya, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati memiliki 1.08 gram Nitrazepam dan yang demikian kamu telah melakukan kesalahan di bawah seksyen 30(3) Akta Racun 1952 dan boleh dihukum di bawah seksyen 30(5) Akta yang sama dan dibaca bersama-sama seksyen 34 Kanun Keseksaan.

[2] The appellant was convicted on both charges. On the first charge the appellant was sentenced to death whereas on the second charge the appellant was sentenced to four years imprisonment with effect from the date of his arrest. This is the appellant's appeal against both the convictions and sentences.

[3] Before we embark upon a detailed consideration of the grounds of appeal, there are three preliminary matters which, at the outset require emphasis. Firstly, this case was initially heard by Samsudin Hassan JC from 4 May 2014 until 2 October 2014 during which period, on diverse dates, three witnesses namely PW1, PW2 and PW3 had completed giving their evidence whilst PW4 had almost completed giving his evidence during examination-in-chief. From 17 November 2014, Dr Sabirin Jaafar JC took over the conduct of the hearing of this case until its completion. Secondly, the second accused namely Koh Mei Ling, during the hearing of the case, was given a discharge not amounting to an acquittal on 2 October 2014 upon an application by the prosecution. She subsequently became the prosecution's witness as PW5. Thirdly, the learned judge failed to deliver reasons for his decision in this case. Thus, when we consider the appeal, we shall do so by merely evaluating the evidence gleaned from the record of appeal before us but totally bereft of a reasoned decision upon which we could comfortably say whether the decision is supported by sufficient and credible evidence. We shall deal with these matters in a moment.

[4] With these preliminary observations, we shall proceed to consider the appeal. We begin by stating the prosecution's case. The facts to the extent that they are central to the appeal appear clearly in the notes of evidence. We propose to state briefly the following evidence that lies at the core of this appeal. It is the prosecution's narrative that the appellant was arrested on 26 March 2013 *circa* 6.20pm at a house No. 22, Jalan Permas Jaya 11/6, Bandar Baru Permas Jaya. The evidence of ASP Mohd Isa Bidin (PW7) reveals that a bunch of keys (exh. P66 (A-F)) with a 'Minnie Mouse' key holder was seized from the console area of a black Honda City bearing registration number JLK 8818. PW7 subsequently handed over the appellant and the bunch of keys to ASP Hamazah Abd Razak (PW4) as he was busy

with the investigation at house number 22. PW4 in his evidence told the court that Inspector Sathiyaseelan was earlier instructed by him to locate the residential address of Koh Mei Ling (PW5), whom PW4 was certain, was the appellant's wife. At approximately 1.20am on 27 March 2013 Inspector Sathiyaseelan informed PW4 that he managed to locate PW5 and brought her to the condominium at No. 08-E3, Blok B, the Straits View Condominium, Jalan Permas Selatan, Bandar Baru, Permas Jaya, Johor Bahru. PW4 then took the appellant to the said premises. Upon arrival, PW4 testified that PW5 was also present outside the premises in question accompanied by Inspector Sathiyaseelan and his men.

[5] PW4 then used one of the keys from the bunch of six keys which was seized from the console area of the black Honda City and gained access to the said premises. It was later led in evidence that the owner of the said Honda City was PW5. According to PW4, PW5 lived at the said premises with the appellant. A search was conducted. From the first room in the said premises PW4 found a Pierre Cardin bag (exh. P7) and in the bag were the following items:

(i) five newspaper packages. In each package there was a clear plastic packet which contained various purple-coloured pills marked by PW4 as A1 to A5 (exhs. P17, P17A, P18, P18A, P19, P19A, P20, P20A, P21, P21A);

(ii) one clear plastic packet which had seven smaller clear plastic packet containing pink-coloured pills marked as A6 (exhs. P22, P22A-G);

(iii) one maxis and four Public Bank 'ang pau' packets, each having a plastic packet which contained various pills marked as B, B1, C, C1, D, D1, E, E1, F, F1 (exhs. P23, P23A, P24, P24A, P25, P25A, P26, P26A, P27, P27A); and

(iv) six erimin five pills marked as G (exh. P28).

From a display cabinet in a second room, PW4 found a paper bag with the words "The Nokia 8, What will you do with it?" written on it. Inside the bag was a plastic bag which contained three newspaper packets with pills in them. These items were marked by PW4 as H for the Nokia 8 bag, H2, H3 and H4 for the three newspaper packets (exhs. P29, P30, P31, P31A, P32, P32A, P33, P33A).

[6] These incriminating exhibits were seized and the pills were in due course sent for chemical analysis. The evidence of the chemist (PW3), which was hardly challenged by the defence, confirmed conclusively that on analysis the pills were ketamine with the net weight of 983.29g and nitrazepam with the net weight of 1.08g. Ketamine is comprised in the First Schedule to Act 234 and therefore is dangerous drug as defined in s. 2

thereof. Nitrazepam on the other hand, is specified in the Third Schedule to Act 366 as psychotropic substance. It ought to be emphasised at this point that this essential element of both offences with which the appellant is charged is not an issue in this appeal.

[7] For the purpose of proof, suffice for us to state that there are three requisite elements of the offence of trafficking of dangerous drug described in the first charge which the prosecution is required to prove and these are:

(a) the appellant was in possession of the dangerous drug;

(b) the appellant at the relevant date and time and the place in question had trafficked in the said dangerous drug; and

(c) the drug specified in the charge is dangerous drug which is comprised in the First Schedule to Act 234 as defined in s. 2 of the same Act.

[8] The charge under s. 30 of Act 366 would require the prosecution to prove the element of possession of the psychotropic substance seized by the police at the material time and the said substance must be shown to be poison as defined in s. 2 of the said Act. Where custody or control of the psychotropic substance is proved, the appellant, by virtue of s. 30(4) of Act 366, is deemed to have known the nature of the substance, until he proves to the contrary.

[9] Before this court, the decision of the learned Judicial Commissioner was questioned on three principal grounds. The three grounds urged on behalf of the appellant were:

(a) that the learned trial judge erred in fact and in law when His Lordship called for the appellant to enter his defence, His Lordship instead ought to have found that the appellant was not in possession of the drugs;

(b) that His Lordship failed to appreciate the defence of the appellant; and

(c) the failure of the learned trial judge to deliver his grounds of judgment had seriously prejudiced and disadvantaged the appellant.

[10] The first ground taken in this appeal, concerns the contention that so far as the evidence shows, the prosecution had failed to prove that the appellant was in possession of the impugned drugs, let alone trafficking in the said drugs. The appellant said that possession was not proven for the reasons that the registered owner of the premises where the drugs were seized by the police was Orientvel Sdn Bhd. The appellant was one of the shareholders of Orientvel Sdn Bhd., however, he was not a director of the said company. This fact was manifested in exh. D41 where it was shown that the directors were Tee Ju Lan and Tee Kim Teck. In fact, Tee Kim Teck was appointed as the company director on 15 March 2013 to replace the appellant. The

appellant was one of the previous directors since 17 July 2000 until he was replaced by Tee Kim Teck on 15 March 2013 (exh. P40). Therefore, on the date of the appellant's arrest, that is, 26 March 2013, the appellant was no longer the director of Orientvel Sdn Bhd. We lay some emphasis on Tee Kim Teck at this juncture because it is the appellant's case that Tee Kim Teck had access to the premises in question. Having examined the evidence adduced by the prosecution, we find that Tee Kim Teck was never called by the prosecution to exclude him from the possibility that he might have access to the said premises. It is incumbent on the prosecution to exclude this possibility especially where the defence had raised the significant point that there were others who had access to the said premises. Having access to the said premises is in our opinion an important evidence that would show that other persons such as Tee Kim Teck who were alleged to have access thereto might probably have access to the drugs as well. On the other hand, where it could be shown that the appellant had the care and management of the premises to the exclusion of any other persons, this essential fact would attract the deeming provision in s. 37(b) of Act 234 that the appellant was the occupier of the premises and hence it could reasonably be inferred that he was so situated with respect to the impugned drugs found in the premises that he had the power to deal with the drugs to the exclusion of all other persons. The Federal Court in *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 had occasion to consider the issue of the necessity to adduce evidence to exclude any possibility of others having access to a vehicle from which dangerous drug was recovered. Of significant importance, the Federal Court, in the judgment of Zulkefli Makinudin FCJ (now President of the Court of Appeal) in addressing this issue said at p. 123:

> [11] It is also pertinent to take note in the present case that the police raiding party were acting on a tip-off which led to the arrest and detention of both the accused. The relevance of this established fact can be seen in the decision of the then Supreme Court in *Abdullah Zawawi bin Yusoff v. PP* [1993] 4 CLJ 1 where it was, *inter alia,* held as follows:
>
> > Given the fact that this was a case where the police were acting on a tip-off, the onus was not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility.
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> [12] The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to

A exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to
B s. 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

[13] It is our considered view that the failure on the part of the prosecution to call the owner of the vehicle or at the very least to tender his statement pursuant to s. 32(1)(i) of the Evidence Act 1950 raises the
C question as to who was in actual control of the vehicle immediately prior to the date of arrest. The prosecution had failed to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of arrest. No explanation whatsoever was offered by the prosecution as to what had happened to the vehicle from the date when the second accused was summoned in Kulim, Kedah
D up to the date when the vehicle was stopped at the road block. There is no evidence to indicate for how long both the accused had been in possession of the vehicle.

[11] It is necessary for the prosecution to negate or disprove the defence that there were others who had access to the premises in question especially
E when questions to that effect were put or suggested to the prosecution's witnesses in the course of their cross-examination. Evidence must therefore be called to rebut this claim by the defence. In *Ooi Chee Seong & Anor v. PP* [2014] 7 CLJ 505; [2014] 3 MLJ 593 the Court of Appeal at p. 606 dealt with this issue at length and Abdul Malik Ishak JCA delivering the judgment
F of the court said:

[41] The appellants' version in regard to Ang was rather simple. That Ang as the occupier of the condominium unit had invited both the appellants to the condominium unit as visitors. That being the case, Ang is the trafficker. It is trite law that the prosecution, in order to establish its case beyond reasonable doubt, must proceed to disprove or negate the defence
G version. It is ideal to refer to the Federal Court case of *Alcontara Ambross Anthony v. PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705 to support this proposition. There, Edgar Joseph Jr FCJ (as he then was) delivering the judgment of the court had this to say at page 719:

> To resume our discussion regarding the important point of
H misdirection as regards the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the judge to have criticised the defence for having failed to put to the investigating officer, the name of Che Mat or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement of
I the appellant made the day after his arrest so that the police had

> all the time in the world to check their veracity. That being the case, the onus was on the prosecution, to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to disprove this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the investigating officer having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the Judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed.

[42] This would be followed by the case of *PP v. Chia Leong Foo* [2000] 6 MLJ 705; [2000] 4 CLJ 649, a decision of Augustine Paul J (later FCJ). There His Lordship aptly said at p. 731 (MLJ); p. 676 (CLJ) of the report:

> As the prosecution has failed to negate the suggestions made by the defence in the course of its case it may still rebut the defence advanced by cross-examination of the accused and his witnesses and/or, if possible, by calling Yee Chin Koon as a witness or tendering his police statement in evidence by re-opening its case at the end of the case for the defence.

[43] James Foong FCJ in *Aedy Osman v. PP* [2011] 1 CLJ 273, at p. 283, writing for the Federal Court expressed the same sentiments:

> From the authorities cited by the appellant's counsel, it is incumbent upon the prosecution to call evidence to rebut any claim which is relevant and material by the defence in the course of cross-examination of the prosecution witnesses than risking dismissal of its case for want of proof.

[44] In order to disprove or negate the appellants' version, the prosecution must call Ang to afford him the opportunity to rebut and deny that he was the occupier of the condominium unit. If called, Ang too would be able to break the nexus that the drugs found in the condominium unit belonged to him. Viewed from these perspectives, the omission by the prosecution to call Ang to the witness box was fatal.

[45] No evidence was led to show that Ang could not be traced. In fact, no attempts were ever made to trace and locate Ang. That being the case, it is right to say that the prosecution offered no response to rebut or disprove the appellants' version about Ang.

[46] In our judgment, this is a classic case where the prosecution failed to call a material witness in the person of Ang. There is no impediment for the prosecution to call Ang bearing in mind that the defence had already put to SP7 and SP9 about the importance of Ang to the factual matrix of the case. The prosecution was alerted that Ang figured

A prominently in the defence case. Thus, in order to disprove or negate the defence version, the prosecution has no choice but to call Ang in order to establish its case beyond reasonable doubt.

[47] Even at the defence stage, the prosecution can still call Ang as a rebuttal witness provided it can show 'that the suggested defences were
B of minimal, doubtful or marginal value' (to borrow the words of Augustine Paul J (later FCJ) in *PP v. Chia Leong Foo* at p. 678). Be that as it may, the failure or omission to call Ang attracted the adverse inference under s. 114(g) of the Evidence Act 1950 and it has also prejudiced the defence. To compound the matter further, the failure to call Ang breached the famous rule in *Ti Chuee Hiang v. PP* [1995] 2 MLJ
C 433, and it has also created a gap in the prosecution's case.

[12] The investigation officer (PW9) had confirmed in cross-examination that he had recorded a statement from Tee Kim Teck. The prosecution chose fit not to introduce the statement. No reasons were given nor explanation afforded by the prosecution why the statement was not produced even though
D the appellant had put to the prosecution's witness namely PW9 that Tee Kim Teck had access to the said premises and that the impugned drugs were placed thereat by Tee Kim Teck and Tee Ju Lan. In our judgment, such failure or omission on the part of the prosecution would justify the invocation of s. 114 illustration (g) of the Evidence Act 1950 (Act 56) that the evidence
E through Tee Kim Teck which could be but was not produced would if produced be unfavourable to the prosecution who withheld it.

[13] The next contention by the defence raises a question of some significance. Tee Ju Lan's name appeared several times during cross-examination of the prosecution's witnesses such as PW5, PW4 and PW9.
F Tee Ju Lan is an important witness. She was the former wife of the appellant. At all material times, Tee Ju Lan was a director of Orientvel Sdn Bhd together with her brother Tee Kim Teck. She was also a shareholder of Orientvel together with the appellant. It was put to the prosecution's witnesses that Tee Ju Lan had access to the said premises. This is manifested
G in the evidence of PW5, PW4 and PW9. In fact, PW9 himself agreed that Tee Ju Lan was an important witness. It is true that PW9 made various attempts to locate her. However when she could not be traced, the prosecution sought to tender as evidence, her witness statement under s. 32 of Act 56. Nonetheless, may it be reminded, the statement of Tee Ju Lan is
H inadmissible for two reasons.

[14] Firstly, the condition for admission of the statement under s. 32 of Act 56 had not been complied with in that the prosecution did not satisfactorily prove that Tee Ju Lan could not be located. We reproduce the relevant extract of s. 32:

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> 32(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases:
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> …
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> …
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> (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law;.

Since the prosecution desired to have recourse to this section, it had to prove that Tee Ju Lan could not be found or her attendance could not be procured without an amount of delay or expense which under the circumstances of the case appeared to the court unreasonable. Where her absence is proved, her statement is itself a relevant fact if it falls under any of the circumstances specified in s. 32(1) in particular paragraph (i) and thus could be admitted. Reference in this connection is made to ID 52 wherein she had given her handphone contact number as 012-7106611. However, there is no evidence that PW9 had tried calling her at this number but in vain.

[15] Secondly, the prosecution sought to tender ID 52, but owing to the objection by the defence, the learned Judicial Commissioner ordered both parties to submit after PW9 had completed giving his evidence. On a quick perusal of the notes of evidence, we find that no such submissions were made after PW9 had testified and the prosecution did not tender ID 52 as exhibit. As such ID 52 remains as identified documents and therefore it is reduced to a piece of worthless document devoid of any evidentiary value.

[16] On the point of non-compliance of s. 32 of Act 56, our attention had been drawn to the case of *Sim Tiew Bee v. PP* [1973] 1 LNS 138; [1973] 2 MLJ 200 where the Federal Court, in dealing with the condition precedent to the reception of a document under s. 32, required to be adduced independent evidence that it would involve such delay and expenses as would seem unreasonable and that fact must be proved strictly. At p. 202, Ismail Khan CJ (Borneo) speaking on behalf of three judges of the Federal Court added:

> This finding is not supported by evidence. The condition precedent to the reception of the document should be independent evidence that it would involve such delay and expense as would seem unreasonable.
>
> In the case of *Chainchal Singh v. Emperor* evidence given by a witness in a judicial proceeding was to be used under section 33 of the Indian Evidence Act in a subsequent judicial proceeding on the ground that the witness was incapable of giving evidence. It was held by Lord Goddard that:

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> Where it is desired to have recourse to this section on the ground that a witness is incapable of giving evidence that fact must be proved, and proved strictly. It is an elementary right of an accused person or a litigant in a civil suit that a witness who is to testify against him should give his evidence before the court trying the case which then has the opportunity of seeing the witness and observing his demeanour and can thus form a far better opinion as to his reliability than is possible from reading a statement or deposition. It is necessary that provision should be made for exceptional cases where it is impossible for the witness to be before the court, and it is only by a statutory provision that this can be achieved. But the court must be careful to see that the conditions on which the statute permits previous evidence given by the witness to be read are strictly proved. In a civil case a party can if he chooses waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence.

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[17] Further, in *Thivasalim Abdul Majeed v. PP* [2014] 2 CLJ 963; [2014] 3 MLJ 124, this court on the same issue had little hesitation in rejecting a statement under s. 112 of the Criminal Procedure Code where it was shown that the prosecution failed to contact Azli through the handphone number provided by him in the said statement. We quote the relevant passage from the judgment of this court which appears at pp. 978-979 (CLJ); p. 136 (MLJ):

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> [32] It must have been upon realising the importance of the evidence of Azli that the prosecution took recourse to s. 32 of the Evidence Act 1950. In this regard, there was no evidence led as to whether efforts were made to locate Azli at the address stated in his s. 112 statement ie No. 7-16-08, Flat Sri Selangor, Jalan San Peng, Kuala Lumpur. We noted that the handphone number of Azli was also stated in his statement. There was no evidence as to whether SP15 did make any attempts to contact Azli through the said handphone number. The family tree of Azli disclosed the address of his mother at No. 2, Kedai Kopi Kampung Manggis, Slim River, Perak. Again there was no evidence that SP15 had gone to this address to locate Azli. Insofar as the address at Revena Villa, Jalan Danau Putra 7, Danau Putra is concerned, there was only a single visit made to the said address. There was no follow up visit thereafter to ascertain if indeed the premise was not occupied as testified by SP15.
>
> [33] Without any efforts made to call Azli on his handphone number and to locate Azli at other available addresses mentioned above, it could not be said that Azli cannot be found. There is therefore much force in the submission of learned counsel for the appellant that the conditions for exh. P101 to be admitted under s. 32 of the Evidence Act 1950 had not been met. It is thus our view that the learned judicial commissioner had erred in admitting exh. P101.

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[18] The other reason urged on behalf of the appellant was the absence of DNA of the appellant on the premises from which the impugned drugs were found. This is an important part of the evidence which in our judgment spoke in favour of the appellant. PW9 in his testimony confirmed that he seized, *inter alia*, three toothbrushes from the bathroom of the first bedroom, a shaver and two tooth brushes from the said first bedroom. PW9 further confirmed that the DNA of the appellant was not found on any of the items seized. This was supported by the chemist report (exh. P44) which revealed that no DNA was detected from these items. With respect to the clothes found in the said premises, fitting exercise was conducted on the appellant and PW9 said, in examination-in-chief, that the shirt did not fit the appellant as it was slightly big. A quick look at the photograph (exh. P39) that was tendered by the prosecution lends support to PW9's evidence on this point. It is not in dispute that the keys (exh. P66 (A-F)) to the said premises were not found on the person of the appellant. They were found in the console of the Honda City belonging to PW5. This was in the evidence of PW7 and PW9. Although PW5 testified that the keys belonged to the appellant, we have to consider her evidence very carefully as PW5 had every motivation to put blame on the appellant bearing in mind that she was indeed an accused turned prosecution witness. In fact, PW5 agreed that in the midst of the trial she was given a discharge not amounting to an acquittal (DNAA) and then became a witness. The effect of a DNAA, we apprehend, is that PW5 was not given a complete acquittal in respect of the charges withdrawn.

[19] When the issue of the proof of the requisite element of possession of the proscribed drugs is considered, the presumption in s. 37(b) of Act 234 becomes relevant where the drugs in question were found in the premises. So far as the evidence has shown, there is the uncontroverted evidence that the drugs were found in the premises in question. Thus, if it could be shown that the appellant had or appeared to have the care or management of the premises, the appellant shall be deemed to be the occupier of the said premises from which we could reasonably infer that he was so situated with respect to the impugned drugs found in the premises that he had the power to deal with the drugs to the exclusion of all other persons. We would in this regard say that even if we were to accept PW5's testimony that the bunch of keys found in her Honda City did not belong to her and that the appellant used her car on that fateful night, at the highest the appellant was one of the occupiers of the premises. May it be remembered that the defence case put to the prosecution's witnesses revealed that apart from PW5 there were two other persons namely Tee Ju Lan and Tee Kim Teck who lived at or had access to the premises. It is indeed difficult for this court to find that the appellant had the care and management of the premises. For the reasons that we have discussed above, we would hold that there were evidential gaps found in the prosecution's case that it would be wholly unsafe for this court to invoke the presumption in s. 37(b) of Act 234.

[20] We have to remember that even though ketamine is listed in the First Schedule to Act 234 and therefore it is dangerous drug, the trafficking presumption under s. 37(da) does not apply to the trafficking charge involving ketamine as the said drug is not included in para. (da). Under the circumstances, the prosecution would have to rely on the evidence of direct and not presumed trafficking. In *PP v. Chia Leong Foo* [2000] 4 CLJ 649; [2000] 6 MLJ 705, Augustine Paul J observed:

> It must be observed that most of the acts that constitute 'trafficking' as defined in s. 2 of the Act like, for example, keeping, concealing, storing, transporting and carrying dangerous drugs involve the prerequisite element of possession … It follows that a person cannot keep, conceal, store, transport or carry dangerous drugs within the meaning of 'trafficking' in the Act without being in possession of them.

The law must now be taken to be well settled that to prove trafficking, the prosecution must show that the appellant had possession of the impugned drugs. This burden inevitably requires further proof that the appellant knew the nature of the impugned drug he possessed, he had power of disposal thereof and was conscious of his possession of the same. Thomson J in *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237 in stating that there could be no possession without knowledge and some power of disposal, explained the meaning of possession in the following terms:

> 'Possession' itself as regards the criminal law is described as follows in Stephen's Digest (9th Ed page 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[21] The law was explained in clear and categorical terms by Ahmad Hj Maarop FCJ (now Chief Judge of Malaya). The learned judge in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149 there said:

> [35] So, in our judgment in the circumstances of this case, the presence of the ladies clothing (two female upper garments and two pairs of female jeans) along with male clothing in the third room of the first house does not mean that no possession was established against Siew. *The crucial question is whether Siew was so situated with respect to the proscribed drugs found in the second and third rooms of the first house that he had the power to deal with the drugs as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need. In other words, Siew must be so situated that he can deal with the proscribed drugs as if it belonged to him, and it must be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so (he had animus possidendi).*

> Invariably this is a fact which can only be proved by inference from surrounding circumstances of this case. It must be clear from the circumstances in which the proscribed drugs were found, that Siew had the intention of dealing with the drugs as if they belonged to him. The list of such possible circumstances is not exhaustive. One example of such circumstances given by Thompson J in *Chan Pean Leon (supra)* is a case where an article is found in a locked room where one holds the key. In the present case, Siew was in possession of the keys to the locked first house in which large amount of dangerous drugs were found in two locked rooms; the keys to which were kept at the locations known to Siew. This brings us back to the circumstances and sequences established by the evidence in this case. (emphasis added)

[22] As we have stated earlier, there were evidential gaps found in the prosecution's case, therefore we could not say with certainty that the appellant had the power to deal with the impugned drugs to the exclusion of all others in respect of both charges. For completeness, the search list (exh. P37) was never signed by the appellant. It was signed by PW5, and PW4 during cross-examination agreed that PW5 signed because she lived there. In the event, we can safely say that the essential elements required to prove possession had not been established, consequently, the element of possession essential in proving the offence of trafficking under s. 39B(1)(a) of Act 234 and s. 30 of Act 366 had not been proven by the prosecution. The learned Judicial Commissioner should not have called upon the appellant to enter on his defence on both charges.

[23] We turn to the second principal ground. The question immediately arises is whether the learned Judicial Commissioner had undertaken a full appreciation of the defence of the appellant. We may commence the discussion of this question by considering the defence case. The essence of the defence of the appellant was that he had no knowledge of the presence of the drugs in the said premises. The appellant stated that the persons who had access to the said premises were Tee Ju Lan who was his ex-wife, Tee Kim Teck, the other director and brother of Tee Ju Lan and Tee Ju Lan's mother namely Ho Siew Kiew. The learned Judicial Commissioner failed to appreciate that the defence of the appellant on others having access had been put to the relevant prosecution witnesses, namely, PW4, PW5 and PW9. It was also put to PW9 that Tee Ju Lan and her children had been to the said premises. The appellant also called Tee Ju Lan's son, DW2, who in essence testified that on 25 March 2013 he and his friends were in the said premises. He was brought there by Tee Ju Lan. The keys to the said premises were given by her. On 26 March 2013, Tee Ju Lan came to send them back. She asked DW2 to bring some bottles of liquor down and after DW2 had gone into the car, Tee Ju Lan went up to the said premises again, this time bringing with her a brown bag and a blue paper bag. By reason of the stance taken

by the defence it is of utmost importance that the prosecution called Tee Ju Lan or at the very least ought to have ensured that her s. 112 statement was properly admitted in compliance with the strict conditions of s. 32 of Act 56. In the result, having regard to the conviction of the appellant, it could be said that the learned Judicial Commissioner had failed to appreciate or appraise adequately the defence of the appellant.

[24] We had been called upon to judge the effect of the failure of the learned Judicial Commissioner to deliver reasons for his decision in the third ground urged on behalf of the appellant. It is indeed a matter of great regret that in this case where the appellant was facing a death sentence the learned Judicial Commissioner had taken up this attitude in not providing grounds, let alone detailed reasons, of his decision in utter breach of s. 52(1) of the Courts of Judicature Act 1964 (Act 9) which mandates that written grounds of his decision shall be provided in the following manner:

> 52(1) When a notice of appeal has been filed the Judge by whom the decision was given shall, if he has not already written his judgment, record in writing the grounds of his decision, and the written judgment or grounds of decision shall form part of the record of proceedings.

We have to remember that without reasons being given the appellant is prejudiced and in no position to know the basis upon which his defence is called and the reasons accompanying the decision to convict and sentence him to death. It is imperative, especially in cases involving capital punishment, that trial judges provide written grounds of judgment necessarily expressing detailed reasons in relation to the findings of fact made and application of the law to such findings of fact both at the *prima facie* stage and also at the final stage of decision.

[25] It would be correct to say, by such failure to deliver reasons, the appellant did not know whether the learned Judicial Commissioner reviewed, discussed, analysed, drew his mind or applied the correct law, took into consideration all relevant judicial authorities and applied any statutory presumptions in s. 37 of Act 234 in coming to his *prima facie* decision on the trafficking charge. Neither did he know whether the learned Judicial Commissioner invoked presumed knowledge or direct evidence of trafficking or made any affirmative finding of possession in coming to his *prima facie* decision. Likewise, the appellant did not know whether the learned Judicial Commissioner assessed, discussed, analysed or drew his mind to the demeanour and made correct findings on the credibility of witnesses for the prosecution and undertook full appreciation of the entire evidence including the defence evidence in concluding that the appellant was guilty as charged. This is even more critical especially when at the initial stage this case was heard before a different judge. The learned Judicial

Commissioner took over the hearing of this case when PW4 had almost completed giving his evidence in chief before the previous trial judge. His assessment of PW4's credibility therefore was important as PW4 was a material witness who was in charge of the police team that went to the premises in question and found the drugs there at the material time.

[26] In *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625, Arifin Zakaria CJ (Malaya) (as His Lordship then was) echoed the sentiments concerning the importance of judge giving reasons for decision at p. 629:

> [6] In this connection, we wish to state that grounds or reasons for a judgment are required so that parties, particularly the unsuccessful one, would know why the judge arrived at the decision the way he did. The reason need not be long especially when the outcome is obvious.
>
> It can be obvious when facts are not in dispute and the law is well established. In such a case, all that is needed is the conclusion and his reason in support of the same. This is not to say that in all cases judgments should be brief and concise. Where facts are disputed, the judge has to discuss and analyse them. Where the law is seriously doubtful, he should argue it out before arriving at a decision. More often than not, judgments become long because facts which are sometimes unnecessary are repeated. Laws and authorities which are well established are recited over and over in the same judgment. Statements are often repeated in different ways. Sometimes, this is intentionally done to stress a point. It only makes the grounds long and unwieldy. Having said that, this is not to discourage judges from writing comprehensive grounds, if they have the ability and time to do so.
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> [7] …
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> [8] We agree that as a general rule, it is incumbent upon the court making a decision to provide reasons for its decision as litigants are entitled to the same. But this ground of judgment, as we said earlier, need not be long, depending much on the subject matter in issue. In some instances, short and concise grounds of judgment will suffice. As was observed by the Privy Council in *Wendal Swann v. Attorney General of the Turks and Caicos Islands* (Privy Council Appeal No. 43 of 2008 delivered on 21 May 2009): "Any court giving a decision after submission have been made has a clear duty (at least in the absence of the parties expressly or impliedly agreeing or otherwise) to give not only a decision, but also the reasons for that decision. Sometimes very shortly expressed reasons are appropriate, or at least acceptable. In the present case, for instance, provided of course that it represented its reasoning, the Court of Appeal could have complied with its duty by stating that the Chief Justice's decision was right in the sense that it was the only correct outcome and/or because it was a decision which he was entitled to reach as a matter of discretion, and that his reasoning was unassailable. However, it appears that the Court did not go even that far: if that is indeed the case, the Court of Appeal failed to do its duty. This should not happen again.

[27] But this was not the only argument advanced by counsel for the appellant. What he further urged was in relation to s. 308 of the Criminal Procedure Code which requires the court appealed from to transmit amongst others the grounds of the decision to the Public Prosecutor and to the advocate for the appellant. On a quick reading of this section, we have very little hesitation to say that s. 308 of the Code provides a mandatory requirement for the transmission of the grounds of the decision to the appellate court and the parties. If no grounds of the decision were provided it would not be far fetched to say that the conviction could not be defended as it would be in breach of art. 5(1) of the Federal Constitution. When dealing with s. 308 of the Criminal Procedure Code in a situation where no grounds of judgment were written by the trial judge, this court in *Johnbosco Chinedu Augustine v. PP* [2016] 3 CLJ 732 referred to its own decision in the case of *Rengarajan Thangavelu v. PP* [2015] 1 CLJ 993 and at p. 738 held –

> [12] Finally, in the case of *Rengarajan Thangavelu v. PP* [2015] 1 CLJ 993, this court dealt with s. 308 of the Criminal Procedure Code when there was no ground of judgment been written by the trial judge. In that case, this court had decided as follows:
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> > [13] We do not find any merit at all in ground (i) and (ii) of the complaint above. As to the ground (iii) in relation to there being no grounds of judgment, we have in the earlier part of the judgment dealt partly in respect of the jurisprudence relating to 'no grounds of judgment'. In the case of *Pembinaan Majujaya & 2 Ors v. Lau Tiong Ik Construction Sdn Bhd* [2008] 1 LNS 29, Hamid Sultan JC (as he then was) has documented all the relevant cases in respect of 'no grounds', 'no sufficient grounds' and/or 'no speaking judgment' and had considered the Malaysian, Indian and English cases. We do not wish to repeat save to say that the instant case is not one where there is no ground at all. If there is no ground at all it will be in breach of s. 308 of the CPC. If there is a breach of s. 308, a conviction cannot be sustained at all as it will breach Art. 5 of the Federal Constitution which says:
> >
> > 5(1) No person shall be deprived of his life or personal liberty save in accordance with law.
> >
> > [14] In such a case, the court will be duty bound to consider an acquittal or send it back for retrial as the conviction on the face of the record will be illegal. (See *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393). In the instant case and on the facts of the case, there is no statutory breach. Our reasons *inter alia* are as follows:
> >
> > (i) The learned judge has given brief grounds to satisfy s. 308;
> >
> > (ii) On the facts and the law in respect of the instant case the grounds is self-speaking. In this case …

(iii) There is little doubt that the prosecution had established a *prima facie* case of trafficking at the prosecution stage. On the facts, the grounds stated by the learned trial judge is sufficient to satisfy s. 308 …

[16] Back to our present case, we agree with counsel that without the grounds of judgment or decision by the learned JC, the appellant had been prejudiced and his right under art. 5 of the Federal Constitution had been compromised (see *Lee Kwan Woh v. PP* [2009] 5 CLJ 631). We are satisfied that a substantial miscarriage of justice has occurred and the conviction against the appellant in this case is not safe.

[28] We shall now refer to the decision of this court in *Ruslan Xanqulu Oglu v. PP* [2016] 1 LNS 132 at paras. 16-17 which had occasion to refer to the case of *Thong Ah Fat v. PP* [2012] 1 SLR 676, wherein His Lordship Mohtaruddin JCA said:

[16] Kami juga bersetuju dengan Peguam Perayu yang bijaksana bahawa Perayu berhak mendapat pengadilan di tiga peringkat (Three tiers system). Tanpa Alasan Penghakiman, Perayu yang menghadapi hukuman mati mandatory telah dinafikan satu peringkat pengadilan. Demi keadilan kepada pihak Pendakwaan dan Perayu kami bersetuju sebulat suara supaya kes ini dibicarakan semula di Mahkamah Tinggi di hadapan Hakim yang lain sepertimana yang diputuskan oleh Mahkamah Persekutuan di dalam kes Mr. Abdullah Saofi.

[17] Sebagai penutup kami ingin mengulangi apa yang diputuskan di dalam kes *Thong Ah Fat (supra)* di muka surat 678:

(7) The nature of the case here, which involved a capital charge, necessitated detailed reasons, especially in relation to the findings of fact made and application of the law to such findings of fact. The judicial duty to state reasons had not been satisfied in the present case. First, the appellate court was unable to ascertain what the judge held was the precise *mens rea* of the appellant. Second, the appellate court was unable to understand how the judge arrived at the conclusion that the evidence given by the appellant was "very thin". Third, there were two ambiguities with respect to the judge's treatment of the cautioned statement, *viz*, whether an adverse inference was drawn against the appellant, and if so, why such inference was drawn. Fourth, the appellate Court neither knew what the judge assessed the contemporaneous statement's nature to be nor the weight it was given. Fifth, there was no reference at all to the alleged first Trafficking Incident which was highly relevant evidence with respect to the Appellant's mens rea. Finally, there were other anomalies in the judgment which could not be reflexively ignored by the appellate Court.

[29] As was in *Ruslan Xanaulu Oglu, supra* and *Thong Ah Fat, supra*, the present appeal involved a capital charge, therefore the nature of the case would render reasoned decision even more necessary. Besides, in this case, the trafficking charge involved ketamine where the trafficking presumption under s. 37(da) of Act 234 does not apply. The appellant did not know on what basis the learned trial judge had found that he was trafficking in the absence of direct evidence of the same; all the more reason why the appellant should be provided with detailed reasons for his conviction and sentence. Similarly, as regards the second charge, the appellant would not be in a position to know the basis upon which he was found to have in his custody or under his control the psychotropic substance and thus was deemed to have been in possession of the substance and to have known the nature of the substance. Under s. 30(4) of Act 366, once the presumption arises, the appellant has to rebut the said presumption by showing proof to the contrary. Yet, no reasons were given that could provide justification to the appellant as to why he was found to have failed to prove to the contrary and to assist this court to determine whether His Lordship was correct in his findings.

[30] Having regard to all the foregoing reasons and on a consideration of various authorities, it is clear to us that the appellant's convictions on both charges are not safe. It would now be incumbent upon this court at this point to consider whether to make an order of acquittal or for the case to be sent back to the High Court for a retrial. We are unable to say, in view of our finding of the insufficiency of evidence in proving both offences, quite apart from there being no grounds of judgment, that this is an appropriate case for a retrial to be ordered. We therefore allow the appeal, set aside the order of conviction and sentence by the learned Judicial Commissioner. The appellant is acquitted and discharged from both charges.